

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES DEPARTMENT OF JUSTICE,	*	
	*	
Petitioner,	*	18-mc-56-LM
	*	September 26, 2018
v.	*	10:40 a.m.
	*	
MICHELLE RICCO JONAS,	*	
Respondent.	*	
	*	
* * * * *	*	

TRANSCRIPT OF SHOW CAUSE HEARING
BEFORE MAGISTRATE JUDGE ANDREA K. JOHNSTONE

Appearances:

For the Petitioner: Seth R. Aframe
US Attorney Office
53 Pleasant Street, 4th Floor
Concord, NH 03301

For the Respondent: Anthony Galdieri (NHAG)
Lawrence Edelman, (NHAG)
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397

Court Reporter: Sandra L. Bailey, LCR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

1 P R O C E E D I N G S

2 THE CLERK: This court is now in session and
3 has before it for consideration a show cause hearing in
4 United States Department of Justice versus Jonas,
5 18-mc-56-LM.

6 THE COURT: Okay. For the record if we could
7 have parties and counsel identify themselves, I would
8 appreciate that.

9 MR. AFRAME: Seth Aframe for the United States
10 Department of Justice.

11 MR. GALDIERI: Anthony Galdieri for the New
12 Hampshire Attorney General's Office and Ms. Ricco Jonas,
13 program manager at the New Hampshire PDMP.

14 MR. EDELMAN: And Lawrence Edelman.

15 THE COURT: Okay. Very good. So, counsel for
16 the Attorney General's Office, will both of you be
17 presenting today or will just one of you be presenting.

18 MR. GALDIERI: It will likely be just myself,
19 your Honor, unless I have a question for --

20 THE COURT: Okay. That's fine. Give me just
21 a minute. I'm trying to sign into my account here. For
22 some reason it's taking a little longer than expected.

23 Okay, so, I thank everyone for the very
24 thorough briefing that's been provided. It's been
25 extremely helpful to me. I've had a chance to review

1 all of the materials that have been provided by both
2 sides, and I have some questions. I'm sure that both
3 parties have information and materials that they would
4 like to highlight for the Court as well, but why don't
5 we do this. I'm just going to start by it's the
6 government's motion to compel, so I'm going to allow
7 them to make a presentation. I'll allow you to respond,
8 Attorney Galdieri.

9 You don't need to reiterate everything that's
10 in your pleadings but there may be things that you want
11 to highlight, and then I, obviously, as I'm sure you can
12 anticipate, have some questions. Okay?

13 MR. AFRAME: I do think that the pleadings
14 cover what I think is a straightforward legal issue in
15 the case.

16 I do just want to talk at the outset about
17 some of the things that I saw in my friend's brief about
18 service just so that we're clear on what happened.

19 THE COURT: Okay, but maybe we don't even need
20 to because from my perspective what happened before this
21 particular subpoena was issued doesn't address, from the
22 Court's perspective, or isn't relevant to the Court's
23 perspective, of the analysis of whether the subpoena at
24 issue, the one that's before me right now is or is not
25 enforceable.

1 MR. AFRAME: Okay. Well, then, I'm happy to
2 turn --

3 THE COURT: Okay? So, I don't think we need
4 to go there. So, Attorney Galdieri, unless you tell me
5 otherwise, you think there's something about what
6 happened before this subpoena was issued that impacts or
7 requires me to rule in a particular way, I don't want to
8 talk about what happened before the subpoena.

9 MR. GALDIERI: No, your Honor, that's fine.

10 THE COURT: All right. So thank you, Attorney
11 Aframe, we can just move right past that.

12 MR. AFRAME: That's great. Okay, so turning
13 to the merits of what I think what is at issue here, the
14 question I think narrowly before the Court today is what
15 does it mean when we say in the case of contumacy buyer
16 refusal to obey a subpoena issued to any person. And
17 what happened here was the United States DEA served an
18 administrative subpoena that's authorized by Section
19 876(a) on a person that it believes has custody or
20 control over documents that are relevant to an ongoing
21 DEA investigation.

22 And you've seen the papers. The response to
23 the subpoena was not to comply with the subpoena on
24 various legal grounds that have been presented. And so
25 we're here asking you to enforce the subpoena served to

1 that person.

2 THE COURT: Okay. Can I just stop you for a
3 minute. Attorney Galdieri, is it the respondent's
4 position that the DEA investigation is not for an
5 appropriate purpose? Are you challenging the purpose of
6 the investigation?

7 MR. GALDIERI: No, our claim is limited to the
8 legality of the subpoena and whether or not the DEA has
9 the authority under the CSA to actually subpoena the
10 state, its agencies and its officials as a matter of
11 statutory construction. And from a Fourth Amendment
12 perspective we believe that there are privacy interests,
13 reasonable expectation of privacy in the prescription
14 drug records kept within the PDMP, and that the use of
15 the subpoena cannot extend to those records absent
16 probable cause and warrant.

17 THE COURT: Okay. So, do you want to just --
18 I know you have other arguments that you will be making,
19 but can you focus on this argument which seems to be the
20 biggest one, which is there is privacy interests out
21 there and there are these Fourth Amendment protections,
22 and for me to enforce the subpoena would run afoul of
23 those.

24 MR. AFRAME: So I have two responses. One is
25 to the extent there are Fourth Amendment protections,

1 and I think there's a good argument there are not, but
2 to the extent there are, the state's not the one to
3 assert those. The Fourth Amendment interest exists in
4 the people whose records they are, they are not here
5 today. The state is trying to make their arguments for
6 them.

7 I cited some cases about the parens patriae
8 doctrine in my papers as I was, you know, looking a
9 little bit at it last night. The Supreme Court in, you
10 know, an older case called South Carolina versus
11 Katzenbach says a state cannot raise a constitutional
12 right, federal constitutional right of its citizens
13 because in the parens patriae doctrine there's two
14 sovereigns at work, the federal sovereign and the state
15 sovereign. The federal sovereign has just as much right
16 and responsibility for its citizens as the state
17 sovereign has. And so it's not an appropriate use of
18 that doctrine to raise Fourth Amendment rights of other
19 people. So I think that's one point.

20 The second point is this is material that by
21 statute all know is going to be released, and while the
22 state PDMP has one requirement that if it goes to law
23 enforcement the state that says that it needs to have a
24 probable cause showing, there are all sorts of other
25 uses that are set forth in the statute for where this

1 information can be disclosed that doesn't require any
2 kind of probable cause.

3 So, you know, when one releases, there's a
4 third-party records doctrine, when one releases
5 information and knows, should know, could know that it's
6 going to be used for all sorts of purposes or could be
7 used for all sorts of purposes, then I think the Fourth
8 Amendment interest is significantly diminished.

9 So I think that's our second argument. That
10 there is no Fourth Amendment impediment even if the
11 state could raise that argument, which I don't think
12 they can.

13 THE COURT: Okay. But isn't there also a
14 statutory scheme that contemplates the production of
15 those records?

16 MR. AFRAME: Well, so --

17 THE COURT: And doesn't have within it any
18 further protections?

19 MR. AFRAME: Right. Yes. So the DEA has a
20 subpoena provision that doesn't limit, but I do think --
21 so I don't want to make my argument too far, I don't
22 want to run astray. If we did have a citizen here who
23 said the DEA is using its, you know, 876 power and
24 they've got these records of mine and now I'm being
25 prosecuted, and they did that without probable cause,

1 could a person raise the Fourth Amendment argument?

2 Yes. I don't know that it's a complete answer to that
3 to say, well, we did it by subpoena. That might be part
4 of the answer. But I don't know -- I just don't want to
5 take my argument too far.

6 THE COURT: Okay.

7 MR. AFRAME: But I do think it's significant
8 here that Congress contemplated the DEA would have
9 access to all different kinds of records and they don't
10 need probable cause to do it, and so the argument that
11 I'm positing that some citizen might make is not what's
12 going on here. The state has these records. The state
13 doesn't have a Fourth Amendment interest in them, and
14 the, not the state, but the director won't turn them
15 over.

16 THE COURT: Okay. So Attorney Galdieri, let
17 me just ask you this on this Fourth Amendment issue.

18 Doesn't the Sturm Ruger case address this
19 issue where the Court of Appeals has said that Fourth
20 Amendment concerns are satisfied if the agency proves
21 that the subpoena seeks information relevant to an
22 authorized purpose, is adequately described, and was
23 issued in accordance with proper procedures. Doesn't
24 that address the Fourth Amendment concern that you have
25 here?

1 MR. GALDIERI: Your Honor, the way we
2 understand the constitutional jurisprudence is that an
3 administrative subpoena cannot issue to access records
4 where there is a Fourth Amendment-based reasonable
5 expectation of privacy in the information that is
6 sought, where the Fourth Amendment actually protects the
7 information.

8 THE COURT: But you have a statutory scheme
9 that already exists that contemplates access.

10 MR. GALDIERI: We would argue from our
11 perspective it does not contemplate access of records
12 held by the state.

13 THE COURT: What's your position to that,
14 Attorney Aframe?

15 MR. AFRAME: It does not contemplate records
16 held by the state, I don't agree with that. I don't see
17 any distinction between state records, other records.
18 These are records. 876(a) speaks in broad terms about
19 subpoenaing any records, including books, papers,
20 documents or other tangible things which constitute or
21 contain evidence. Whether they are the state's --
22 whether they are in a state database or some other
23 place, they are in my view covered by that plain
24 language of 876(a). So, no, I don't think it matters
25 that they are in a state database for purposes of

1 whether there's an authority to use the subpoena.

2 And so this is a properly done administrative
3 subpoena under the Fourth Amendment, which is what Sturm
4 Ruger says. I think the question that's being raised is
5 if the subpoena is being used to subvert the warrant
6 requirement, then I think you might have, you know, a
7 warrant that requires probable cause. Administrative
8 subpoenas don't require probable cause.

9 So the question here is, is this some kind of
10 super secret kind of information that should require
11 that I think is what the argument -- I think that's the
12 argument they're making.

13 THE COURT: Is that the argument you're
14 making, Attorney Galdieri, that the only way to access
15 this information is through a warrant? As I read the
16 statute, it says court order or warrant. And if I
17 enforce the subpoena, isn't that a court order and
18 wouldn't it then be --

19 MR. GALDIERI: It would have to be a court
20 order based on probable cause under the state statute.

21 THE COURT: But Sturm Ruger says probable
22 cause is established under the circumstances that have
23 been presented here. You've indicated that you're not
24 challenging the legitimacy of the investigation.

25 MR. GALDIERI: Well, we are challenging the

1 legitimacy of the subpoena. We think the subpoena is
2 invalid and it cannot actually issue against the state,
3 its agencies or its sovereign. As a matter of statutory
4 construction, the term person as used in the CSA, does
5 not embrace the sovereign states, and the longstanding
6 United States Supreme Court presumption that the term
7 person is used in a congressional enactment does not
8 include the sovereign, applies to this statute. And if
9 the CSA is read as a whole, it's very clear what it
10 contemplates. It contemplates cooperative arrangements
11 with state's inner agencies. In Section 873 --

12 THE COURT: Are you suggesting that because
13 there's a statute that says that the state and federal
14 government should cooperate with each other that that
15 means they are forbidden from subpoenaing documents?

16 MR. GALDIERI: It means that Congress did not
17 intend in 876 that administrative investigative
18 subpoenas would issue against the state.

19 THE COURT: What's your authority for that?
20 What's your authority for that? I don't read the
21 Controlled Substances Act and that language as saying
22 that at all. If that were the case, wouldn't they have
23 carved out those types of subpoenas from the
24 administrative subpoena function that's in the law?

25 MR. GALDIERI: Well, I think one of the things

1 we have to look at is there is a longstanding
2 presumption that when the word person is used in a
3 congressional enactment, it does not include the
4 sovereign states or the United States.

5 THE COURT: But the subpoena in this case was
6 issued to an individual.

7 MR. GALDIERI: Well, it was issued to Ms.
8 Ricco Jonas as the program manager of the New Hampshire
9 PDMP.

10 THE COURT: But she's designated as the person
11 who's the keeper of the record.

12 MR. GALDIERI: She is not considered -- she is
13 a state official. That's who she is. Just like in the
14 Will case, the U.S. Supreme Court said state officials
15 sued in their official capacity, asking them to --

16 THE COURT: She's not being sued. There's no
17 lawsuit here. What's your authority that an
18 administrative subpoena is the same thing as commencing
19 a lawsuit? This case is in the docket as a
20 miscellaneous case. It's not the federal government
21 versus the state of New Hampshire.

22 MR. GALDIERI: Well, your Honor, we would make
23 an offer of proof that Ms. Ricco Jonas does not possess
24 and have lawful access to New Hampshire PDMP data in her
25 personal capacity. She only has that access as a state

1 official, and state law constrains her, absent an order
2 based on probable cause issued by a court, to release
3 that information. She cannot just voluntarily turn it
4 over without committing at least one state crime, maybe
5 other state crimes. So she can't do that under our
6 state law.

7 THE COURT: Are you arguing that if this Court
8 were to compel compliance with the subpoena that she
9 would be subject to criminal sanctions?

10 MR. GALDIERI: I think there's a possibility
11 that she could be subject to criminal sanctions. She
12 may have a defense to those criminal sanctions. But I
13 do not --

14 THE COURT: And who's the body or the entity
15 that would be commencing criminal action against Ms.
16 Jonas?

17 MR. GALDIERI: Well, I don't have the answer
18 to that at this time.

19 THE COURT: Is it the Attorney General's
20 Office?

21 MR. GALDIERI: But we also have concerns --

22 THE COURT: Is it the Attorney General's
23 Office?

24 MR. GALDIERI: It would probably, yes, be the
25 Attorney General's Office.

1 THE COURT: What's the likelihood of that
2 happening if the court were to order her to produce the
3 documents, I mean, seriously.

4 MR. GALDIERI: Well, I'm not sure the
5 likelihood would be high if the court ordered her to
6 produce the documents. I'm not sure that's the legal
7 question.

8 THE COURT: So under this situation where
9 there's a federal investigation that you're not
10 challenging the legitimacy of for lack of a better word,
11 and there are records that Ms. Jonas is in the custody
12 and control of, whether it's in her individual or her
13 official capacity, as the Court looking at this
14 administrative subpoena, I'm not sure I need to even
15 reach the issue of whether it was -- she was named in
16 her official or her individual capacity. She is the
17 keeper of those records. That's what she's designated
18 to be responsible for under the statute.

19 So, my question to you is, how are those
20 documents to be accessed in connection with an
21 investigation? What's your process? What do you say
22 the government needs to do in order to get those
23 records?

24 MR. GALDIERI: They need to establish probable
25 cause independent of PDMP-kept data and present an

1 order, court order based on probable cause to the PDMP
2 program manager.

3 THE COURT: So how is it that the Sturm Ruger
4 case doesn't address that issue?

5 (Pause.)

6 MR. GALDIERI: Your Honor, we -- two answers
7 to that. Our first answer is we're not a person within
8 Section 876. We don't believe we're a person who can be
9 subpoenaed, who can serve a subpoena, who can have a
10 subpoena enforced against them as a matter of statutory
11 --

12 THE COURT: When you say we aren't a person,
13 who's the we?

14 MR. GALDIERI: Ms. Ricco Jonas --

15 THE COURT: Ms. Jonas isn't a person?

16 MR. GALDIERI: The program manager has to
17 release the information. The program manager. The
18 program manager, if something happens to her tomorrow, I
19 assume they're going to still want us to enforce the
20 subpoena against the next program manager.

21 MR. AFRAME: I don't agree with that. I think
22 that's made up. We cannot hold someone else in contempt
23 for her. If she decides to take a new job tomorrow, we
24 would have to issue a subpoena to the next program
25 manager by their name and ask for those records. We

1 could not hold someone no longer -- that person would
2 not have control anymore, we could ask you to hold that
3 person in contempt, so I don't accept that premise.

4 MR. GALDIERI: And this is why, your Honor,
5 that it is an action against the state. It is the
6 state's information.

7 THE COURT: What's your authority that this is
8 an action against the state? I don't have a lawsuit in
9 front of me. I have a subpoena, administrative subpoena
10 in front of me. What authority do you have that you can
11 point me to that says that when an entity, government
12 entity, federal government entity serves a subpoena
13 seeking records that are held by an individual such as
14 Ms. Jonas who's designated as the keeper of these
15 records, that that is a lawsuit against the state? I
16 just -- I don't have any basis to get to that
17 conclusion. I'm asking you to try to help me to get
18 there.

19 MR. GALDIERI: Well, we would submit, your
20 Honor, that this is a petition to enforce, this is a
21 suit, and that the actual statutory --

22 THE COURT: It's a petition to enforce a
23 subpoena under the discovery rules.

24 MR. GALDIERI: No, it's under Section 876.

25 THE COURT: That's where the authority to

1 issue the subpoena comes from. But the enforcement
2 mechanism is to say we've issued an administrative
3 subpoena. It hasn't been complied with. Court, compel
4 compliance.

5 MR. GALDIERI: Well, your Honor, I would
6 suggest in the Al Fayed case this issue was raised with
7 respect to a different statute where the CIA claimed
8 that it was not a person who would have to produce
9 documents in that case pursuant to the statute at issue.
10 I think it was Section 1782. And the DC Circuit court
11 agreed and the district court agreed and found that the
12 CIA was not a person --

13 THE COURT: But this isn't a subpoena that's
14 been issued -- it's a subpoena that's been issued to the
15 keeper of the records, to the individual who's
16 designated by statute as being responsible for
17 maintaining these records.

18 (Pause.)

19 MR. GALDIERI: Your Honor, I think there is a
20 presumption in the case law that when you name an
21 official, a state official in, like Ms. Ricco Jonas's
22 name as the program manager of the New Hampshire PDMP,
23 that the subpoena or the action, whatever it is, is
24 being brought against the state. It is the state's
25 information. It is the state's interest. Can they go

1 and subpoena the governor and ask him to go to the PDMP
2 and get the information out of it? He's in charge of
3 state government.

4 I mean, from our analysis of the CSA, and this
5 analysis has been applied to other statutory schemes and
6 rule schemes, even the Federal Rules of Civil Procedure,
7 this analysis of whether the authority exists, which in
8 876 that a person includes the state, whether it
9 includes its officials or its agencies, is a
10 longstanding presumption that the United States Supreme
11 Court applies. And the Ott case and Yousuf case applied
12 it in the context of Federal Rule of Civil Procedure 45.
13 Al Fayed applied it in the context of another statute
14 that's similar to the one we're looking at in Section
15 876. And we would submit that in determining whether or
16 not there's even authority to issue a subpoena to a
17 state official to get state information when the state
18 is the real party in interest, there has to be authority
19 that comes out of the CSA for that. And it can't be
20 that Ms. Ricco Jonas, just by virtue of being a person,
21 can take information from the state that the state has
22 said it can't be taken, it can't be moved out, take it
23 and give it to the DEA without, I would argue that she
24 doesn't have the authority to do that. I'm not sure she
25 has the authority to do that under the law.

1 THE COURT: Attorney Aframe.

2 MR. AFRAME: This brings us all the way back
3 to the preemption point because the argument is the
4 state won't allow her to release the records. Well,
5 what she's relying on is a provision that can't be
6 applied against a federal subpoena, and that's what the
7 Ninth Circuit case is really about, which I know they
8 didn't want to make that argument, I don't think,
9 because the Ninth Circuit ruled on the preemption point
10 and that probably would have been a start, but we're
11 kind of circling back because what they're saying is she
12 can't turn over the documents because there's a
13 provision in state law that says she needs probable
14 cause to give it to a law enforcement agency. If they
15 had just said that straight out, our answer would have
16 been yes, because of preemption. The supremacy clause
17 says that 876 trumps that because their state rule
18 interferes with the federal attempt under the CSA to get
19 information. And so all they're really saying now is,
20 oh, she's not in control of the records because the
21 state law doesn't let her turn them over, but that
22 provision they're relying on is preempted. So if you
23 get rid of that, of course she can turn them over.
24 There's no impediment.

25 MR. GALDIERI: Your Honor --

1 THE COURT: So address the supremacy clause
2 issue. It wasn't the focal point of either one of your
3 arguments and so I was tempted to start there and say
4 doesn't that end the conversation, but it looks like
5 that's where we ended up right now. So I'm asking you,
6 if that's what you're relying on, she's concerned about
7 the state requirements, there are lots of occasions
8 where folks come in from the Attorney General's office
9 in other places and say we have these state law
10 constraints, and I understand that, which is why I asked
11 you the question of if I compel the production, doesn't
12 that address the other piece of the state law even which
13 says it's a court order or a warrant based on probable
14 cause?

15 MR. GALDIERI: Your Honor, we don't agree with
16 the premise that our state law on probable cause
17 requirement is preempted by the supremacy clause. The
18 Ninth Circuit, the Utah case, the District of Oregon
19 case never reached the issue of whether a subpoena could
20 issue under 876 to the state or its sovereign agencies
21 or its officials. It never addressed that issue. And
22 if that cannot happen under the CSA and there's no --

23 THE COURT: Okay, but if I find, and I'm not
24 saying I'm making this finding, but if I find that there
25 is no state action, now what? There is no action

1 against the state, now what? What's your argument now?

2 (Pause.)

3 MR. GALDIERI: Well, your Honor, I think our
4 argument then becomes it is an improper use of an
5 administrative subpoena under the Fourth Amendment where
6 you have a Fourth Amendment-based reasonable expectation
7 of privacy, and the records that are being sought, that
8 is recognized as a constitutional right of privacy, that
9 the warrant requirement applies.

10 THE COURT: And then what's your response to
11 the Sturm Ruger authority in the circuit that says it's
12 met when there's a legitimate investigation?

13 (Pause.)

14 MR. GALDIERI: Your Honor, we would reiterate,
15 I'm not entirely familiar with the facts of Sturm Ruger.
16 If that was an administrative subpoena at issue, I mean,
17 our argument is based on our research that an
18 administrative subpoena cannot be used to acquire
19 documentation or information that there's a reasonable
20 Fourth Amendment-based expectation of privacy. I would
21 have to look more closely at Sturm Ruger to answer your
22 question.

23 THE COURT: And I just want to set those
24 arguments aside. Under the state law scheme,
25 recognizing and accepting that there may be privacy

1 interests in the information, there is still a process
2 by which that information is obtainable. You agree with
3 me, correct?

4 MR. GALDIERI: Correct.

5 THE COURT: Okay.

6 MR. GALDIERI: Correct, there's always a
7 process --

8 THE COURT: Despite those privacy interests.

9 MR. GALDIERI: Correct.

10 THE COURT: There's a process. And what it
11 appears that folks disagree about is whether the
12 supremacy clause takes away the state's arguments in
13 this case, or whether if I otherwise find that the
14 government's administrative subpoena is appropriate,
15 that they've met whatever the state law requires by
16 issuing an order to compel production of the materials
17 under the subpoena to enforce the subpoena. And what
18 you're telling me is my order, if I were to issue one,
19 authorizing the government's subpoena, ordering that it
20 be complied with, that that does not satisfy the state
21 law requirement for a court order?

22 MR. GALDIERI: If it is a court order that
23 articulated that it is based on probable cause, which I
24 think is what is being indicated, or --

25 THE COURT: I'm -- I've been asking, doesn't

1 Sturm Ruger address that issue for me about probable
2 cause, and if I were to go down that road and say Sturm
3 Ruger addresses the probable cause issue, I do the
4 analysis and I find that the subpoena is enforceable and
5 I order that it be complied with, I'm asking you under
6 those circumstances why isn't it that -- how is it that
7 it doesn't neatly fit in what the state law requires.
8 That's what I'm trying to understand. I'm struggling
9 with that.

10 MR. GALDIERI: I would have to go back and
11 revisit Sturm Ruger --

12 THE COURT: Okay.

13 MR. GALDIERI: -- to answer that question
14 fully for you, your Honor. I would say if you go
15 through the analysis and you find an 876 subpoena is
16 issued against the state --

17 THE COURT: I don't think I have to make a
18 finding that it issues against the state. You're
19 presuming that I'm agreeing with you on that issue, and
20 I'm not sure I do.

21 (Pause.)

22 MR. GALDIERI: Your Honor, we would just
23 reiterate our position that we believe this is really an
24 action against the state, it is a petition to enforce
25 against the state, and that the statute does not

1 contemplate these types of subpoenas.

2 THE COURT: Okay, but if I don't get there, if
3 I disagree with you on that analysis -- I'm looking at
4 your objection to the petition to compel compliance with
5 the administrative subpoena and I'm on page six. It's
6 right in the middle of the page. And you indicate here
7 right in the middle it says the legislation also
8 authorized the board to disclose PDMP data to authorized
9 law enforcement officials on a case-by-case basis for
10 the purpose of investigation and prosecution of a
11 criminal offense when presented with a court order based
12 on probable cause. No law enforcement agency or
13 official shall have direct access to the program.

14 So my question to you is, if the court finds
15 that the Sturm Ruger case provides First Circuit
16 authority, federal authority that the government has
17 established probable cause and I otherwise find that the
18 administrative subpoena has been properly sought, for
19 lack of a better word, or issued based, on what federal
20 law says I'm supposed to analyze an administrative
21 subpoena under, then if I issue an order compelling
22 compliance with the subpoena, am I not squarely in
23 318-B:35, I(b)(3)? So we don't even have a violation,
24 alleged violation or issue with state law. It's
25 consistent.

1 MR. GALDIERI: Yet, your Honor, if that is
2 what you find in your order, yes, that order I believe
3 would be consistent if that is what you find based on
4 your analysis without conceding any appellate rights.

5 THE COURT: Okay. And I understand that your
6 -- what you're telling the Court is the reason I can't
7 get to this place is because the subpoena in this case
8 is an action against the state.

9 MR. GALDIERI: Yes. You cannot get -- it is a
10 subpoena that is directed to the state. There's no
11 authorization in the CSA 876 to direct subpoenas to the
12 state -- to the state, their agencies or their officials
13 to command them to produce records under the CSA for the
14 purposes of an investigation.

15 THE COURT: So you're taking that to its
16 logical conclusion in what you're saying is the only way
17 for law enforcement, whether it's state or federal law
18 enforcement, to access these records is with what? How
19 would they get these records? What's your alternative
20 theory for how they would get them?

21 MR. GALDIERI: So they go out and they do
22 investigative work that gives them, generates probable
23 cause. They come and they get a court order based on
24 probable cause and ask to access the data. The
25 statutory scheme contemplates that, it doesn't

1 contemplate that law enforcement investigations start
2 with the PDMP, so that law enforcement --

3 THE COURT: I don't think -- there's an
4 affidavit here I think that suggests that's not what's
5 happening. They've done an investigation and they're in
6 the place where they are subpoenaing those records as
7 part of their investigation.

8 So your position is, short of getting a
9 warrant they can't access these records. That's your
10 position.

11 MR. GALDIERI: That's correct.

12 THE COURT: Okay. That's helpful to me.
13 Thank you, I appreciate that very much.

14 All right, I've interrupted folks and so what
15 I want to do is give both sides an opportunity to just
16 regroup, take a few minutes. I think you sort of
17 understand my thought process and where I'm having some,
18 I needed some additional information, so I'm going to
19 just let you think about how you want to sum up, if
20 there's anything you want to highlight for me. If you
21 want to take a few minutes, if you have the Sturm Ruger
22 case handy and you want to take a quick look at it, I'm
23 happy to do that too.

24 MR. GALDIERI: Sure.

25 THE COURT: All right?

1 MR. AFRAME: Take a few minutes?

2 THE COURT: Yes, just stretch your legs, take
3 a few minutes. Why don't you come back in ten minutes.
4 All right?

5 (Recess.)

6 THE COURT: Okay, so I did tell you that I was
7 going to give you an opportunity to wrap up and
8 highlight things for me, but I actually have two loose
9 ends, and they may be the same loose ends that you were
10 planning on addressing, and so you can tell me you were
11 just going to plan on addressing those in your closing
12 remarks.

13 So the first question I have is for Attorney
14 Galdieri. We talked a little bit about, you know, we
15 were talking about a scenario where there was a warrant
16 issued based on probable cause, and so my question for
17 you is, in that scenario am I correct in assuming that
18 it would be Ms. Ricco Jonas or some other individual
19 that holds her position if she wasn't that individual,
20 that would be facilitating the compliance with the
21 warrant?

22 MR. GALDIERI: Yes, that's my understanding.

23 THE COURT: Okay. All right. And so the
24 other question I have is really a question for both of
25 you and it goes back to the Sturm Ruger case that talks

1 about what satisfies the Fourth Amendment.

2 And so if the Fourth Amendment is satisfied,
3 am I correct that that subsumes within it probable
4 cause. All right? So those are my questions.

5 MR. AFRAME: So, I mean, the Fourth Amendment
6 -- so I don't know what the state's action means. I
7 mean, you know, the state has to address probable cause.

8 THE COURT: Sure, yes.

9 MR. AFRAME: The Fourth Amendment doesn't
10 always require probable cause. It requires probable
11 cause for a warrant.

12 THE COURT: Right.

13 MR. AFRAME: Warrant shall issue on probable
14 cause. This is an administrative subpoena. It's
15 technically -- it's not a search. It's a request for
16 documents. And I think that the notion is Sturm Ruger,
17 especially where these documents are documents that are
18 in the possession of a third party, there's no reason
19 that an administrative subpoena can't be used for those
20 things, and the Fourth Amendment is satisfied because
21 this is not a search. The warrant requirements of the
22 Fourth Amendment doesn't apply. And the standard under
23 Sturm Ruger for satisfying the Fourth Amendment is met.

24 Now, if there's a probable cause requirement
25 under the state law, that's back to preemption because

1 the Fourth Amendment is satisfied. So there's no
2 federal impediment to enforcing the federal statute,
3 because the only way they can get around supremacy
4 issues is to say there's some federal impediment to
5 stopping the federal government from using its authority
6 under 876(c). Well, what would trump a federal statute?
7 A federal Constitution. But the federal Constitution is
8 met because this is not a search. The warrant
9 requirement does not apply. The Fourth Amendment is
10 satisfied.

11 Their law says probable cause. Now, I can't
12 tell you if they mean by probable cause Fourth Amendment
13 probable cause, but I'll assume they do. If they're
14 engrafting their own desire for additional protections
15 that the federal Constitution does not impose, that's
16 preempted because that interferes with what the federal
17 government's doing.

18 THE COURT: Very good. Attorney Galdieri.

19 MR. GALDIERI: Your Honor, our response to
20 that is that we have argued that it is the Fourth
21 Amendment's probable cause standard. We believe our
22 state statute encapsulates that by requiring probable
23 cause. It's really a reflection of what the Fourth
24 Amendment requires.

25 And we read the Sturm Ruger case to say that

1 in the course of resisting an administrative subpoena,
2 the Fourth Amendment is available to the challenger as a
3 defense against enforcement of the subpoena. And we
4 believe those Fourth Amendment interests are at issue
5 here. A person -- New Hampshire residents have a Fourth
6 Amendment-based reasonable expectation of privacy in
7 their PDMP kept data. The state has recognized that in
8 the law and has protected it. And there is federal case
9 law that recognizes that prescription drug records, a
10 subset of medical records, are highly private in nature,
11 and there are circuit courts that recognize that there
12 is a reasonable expectation of privacy in those records.

13 The Douglas case from the Tenth Circuit, the
14 Doe case from the Third Circuit, and United States
15 Supreme Court has recognized that there is a Fourth
16 Amendment-based reasonable expectation of privacy in
17 medical records, in Whalen versus Roe and Ferguson
18 versus City of Charleston. And in the Seventh Circuit,
19 or the First Circuit, excuse me, has even recently in
20 Eil versus U.S. Drug Enforcement Administration in 2017,
21 commented on the -- that persons have significant
22 interests in their medical records which the First
23 Circuit has described previously as highly personal and
24 intimate in nature.

25 We do not read Sturm Ruger to say that a

1 Fourth Amendment defense through an administrative
2 subpoena cannot be raised.

3 THE COURT: All right. You're all set on
4 that? I'm going to turn it over to you, Attorney
5 Aframe, for further response.

6 MR. AFRAME: So I suppose, when he says Fourth
7 Amendment defense, he's saying that the no warrant, what
8 the Fourth Amendment says, of course, is the right of
9 the people in their papers against unusual searches and
10 seizures so as not to be violated and no warrant shall
11 issue upon probable cause.

12 Well, we're not seeking a warrant. That's
13 pretty much, that's established, we're using
14 administrative subpoena. I suppose the question that
15 he's raising is can we use an administrative subpoena to
16 get records that are within the PDMP or are we required
17 to use a warrant. I think that's the argument that's
18 being made. And I think that common experience tells us
19 that subpoenas are commonly used for medical records.
20 Grand jury subpoenas issue all the time to hospitals for
21 records. We don't say you need a search warrant to go
22 to Dartmouth-Hitchcock and get a file.

23 Congress obviously understood that because
24 they then passed HIPAA, and HIPAA as you know is a
25 complicated regulatory scheme that decides when and,

1 when you can and cannot get records from third-party
2 health care entities. That's, you know, so, you don't
3 need a warrant, you need to comply with the statutory
4 regime, you know, in certain circumstances, but that has
5 nothing to do with whether you need a subpoena or a
6 warrant.

7 So, I would suggest to you that when records,
8 I'm not going to disagree that they're not personal
9 records, of course they are, but when they are released
10 to third parties, that warrant requirement of the Fourth
11 Amendment does not apply. And I think if you look at
12 the PDMP statute you will see that it has many, many
13 different ways that someone's records can be released to
14 different entities without there being probable cause.
15 Their own statute says you can give it to the Board of
16 Medicine. You can give it to other different entities
17 without probable cause.

18 So, when you release records, and you
19 understand that they're then going to end up in this
20 database and then they can end up in all sorts of
21 different places, that just doesn't comport when the
22 warrant requirement would apply.

23 So the bottom line here is that the warrant
24 requirement does not apply. We are dealing with the
25 part of the Fourth Amendment that says the right of the

1 people to be secure in their papers against unreasonable
2 searches and seizures shall not be violated. And what
3 Sturm Ruger says is that part of the Fourth Amendment is
4 satisfied so long as an administrative subpoena meets
5 the requirements laid out here. And I don't think
6 there's any dispute that they don't.

7 So, that's why I think Sturm Ruger's
8 controlling, because the warrant requirement does not
9 apply.

10 THE COURT: Okay. Thank you. Attorney
11 Galdieri.

12 MR. GALDIERI: Just one piece of information
13 about the state statutory scheme and how it works. The
14 state statutory scheme is in place to benefit the health
15 and welfare of patients in the medical profession. It's
16 not a law enforcement tool.

17 THE COURT: Well, I think there is an aspect
18 of it that also addresses that the materials are
19 recognized that they would be used in law enforcement
20 activity.

21 Am I reading that incorrectly?

22 MR. GALDIERI: They are used in -- PDMP
23 materials are only used with respect to law enforcement
24 if there is a court order based on probable cause.

25 THE COURT: Well, then that was contemplated

1 when the scheme was put in place. It wasn't simply for
2 use by a health care professionals. It recognizes that
3 the materials could be used by law enforcement in
4 investigations as well.

5 MR. GALDIERI: That if a warrant based on
6 probable cause or a court order based on probable cause
7 came in, yes, I think that is the expectation generally
8 in our society that that information would then be
9 turned over, but not through an administrative subpoena.

10 And what happens within the New Hampshire
11 Pharmacy Board is this information is used to
12 investigate health care providers and to look at whether
13 there is professional misconduct and to appropriately
14 discipline or bring action against them. It's not to
15 investigate patients. It's not to reveal patient
16 information to the world, or even to these boards. The
17 boards don't need to necessarily know anything about the
18 patients. And that is part of why the PDMP is kept
19 separate from law enforcement and still has a probable
20 cause requirement attached to law enforcement requiring
21 records pursuant to --

22 THE COURT: But it's 318-B:33 that requires
23 prescribers and dispensers to identify patient names,
24 addresses, dates of birth and phone numbers. That's
25 part of what they're required to submit to the database.

1 MR. GALDIERI: Sure. There is a component to
2 this where physicians and prescribers when they input
3 information into the system, and that information goes
4 into the system into the PDMP, and then the PDMP is used
5 by the Board of Pharmacy to investigate and make sure
6 compliance is maintained by health care professionals,
7 by dispensers, by prescribing physicians. It's not a
8 tool to be used to begin law enforcement investigations
9 against patients.

10 MR. AFRAME: Can I make a comment on that?

11 THE COURT: Certainly.

12 MR. AFRAME: So that's a misunderstanding what
13 the reasonable expectation privacy standard's all about.
14 It's not a question of is it about do we want to prolong
15 for purposes. The reasonable expectation of privacy
16 under Katz is a subjective and objective standard. And
17 objectively this information under this statute can go
18 to a lot of different places. That's what's important.
19 It can go to the Board of Dentistry, the Board of
20 Medicine, the Board of Nursing, the Board of
21 Registration. I'm sure they have good purposes for it.
22 But the point is when you go to a doctor, when you go to
23 the pharmacy, you turn over your script, that script's
24 going into a database, and that database is going to be
25 available to third parties. Once it's available to

1 third parties, that reasonable expectation of privacy
2 that would trigger the warrant requirement under the
3 Fourth Amendment is lost.

4 THE COURT: Okay. So, I'm going to give you
5 an opportunity to respond, Attorney Galdieri, but I'm
6 also looking at New Hampshire RSA 318-B:34. And it
7 specifically states in paragraph one that, it certainly
8 suggests that patient information can be disclosed when
9 it's authorized by state or federal law. And I
10 understand your arguments as they relate to whether the
11 subpoena is an action against the state and some of
12 those other issues, but the notion that this database
13 was created and it wasn't contemplated that law
14 enforcement would have access through an administrative
15 subpoena to access this information if the subpoena were
16 otherwise lawfully issued, I mean, this seems to suggest
17 exactly that, that there would be an opportunity for
18 that.

19 Am I reading this section incorrectly?

20 MR. GALDIERI: The way I read this section,
21 your Honor, in Roman I is it specifically states that
22 the information contained in the program is not subject
23 to discovery subpoena or other means of legal compulsion
24 for release and shall not be shared with an agency or
25 institution except as provided in the subdivision. This

1 paragraph shall not prevent a practitioner from using or
2 disclosing program information about a patient to others
3 who are authorized by state or federal law or
4 regulations to receive program information.

5 So, going to a practitioner and getting that
6 information is not forbidden. But there are certain
7 enhanced protections when the state or any government
8 agency is going to start collecting mass amounts of
9 personally identifiable private information about
10 persons into a database. And we believe that the
11 information in the database is subject to the
12 protections, and state officials cannot just give it
13 out. It becomes in a sense the cookie jar, the easy
14 starting place, and that is what the New Hampshire State
15 Legislature --

16 THE COURT: But these facts don't -- under
17 these facts this is not a case where there's a starting
18 place. We have an affidavit that indicates there's an
19 ongoing investigation. And you haven't challenged the
20 sufficiency that there is in fact an investigation.

21 MR. GALDIERI: Well, we understand that there
22 is an investigation. We understand from the declaration
23 that information may have been received by the DEA from
24 the New Hampshire Board of Pharmacy. It is our
25 position, the position of our office that if that

1 information included PDMP data, that that was
2 inappropriate and improper under the statutory regime.

3 THE COURT: Attorney Aframe.

4 MR. AFRAME: So I think the section you
5 pointed, the sentence you point out is very important to
6 the analysis that I think applies here.

7 So, New Hampshire as a matter of public
8 policy, its own decision, it's how it wants to deal with
9 its PDMP data, has decided that if a state officer wants
10 to come and get PDMP information, they're going to have
11 to follow this state requirement under state law, and
12 that's a matter for New Hampshire to figure out. What
13 we're figuring out here is what does the federal
14 Constitution Fourth Amendment require. And my position
15 is that what needs to happen if the state were to have
16 any traction here, they would have to prove to you that
17 the warrant requirement of the Fourth Amendment applies.
18 The warrant requirement of the Fourth Amendment only
19 applies to things over which there's a reasonable
20 expectation of privacy.

21 This sentence that you point out says that a
22 doctor cannot say in response to a subpoena, guess what,
23 I'm not going to turn over the subpoena. You know why?
24 Because it also belongs in the PDMP database. And the
25 PDMP database has all these rules that New Hampshire has

1 put in place because it wants to, and so I'm not going
2 to comply with this subpoena.

3 What this says is, no, you do have to comply
4 with the subpoena. Well, what does that mean? That
5 means there's no reasonable expectation of privacy in
6 that information because in addition to your doctor
7 turning it over to the PDMP, he or she is going to have
8 to turn it over to whatever subpoenas come from, the
9 grand jury or other places where, you know,
10 administrative subpoenas that might be issued.

11 So, that just says to us that, sure, New
12 Hampshire's put a whole bunch of regulatory rules that
13 they want their state officers to comply with. We as a
14 federal government have no stake in that matter. But we
15 as a federal government have our own set of authorities,
16 and our question is can we enforce those authorities.
17 And as I said before, the only impediment to us doing
18 that is the federal Constitution. And that Fourth
19 Amendment, there are two parts to it. Does the warrant
20 requirement apply I think is the issue here, and it
21 doesn't.

22 And so when you're dealing with the first part
23 of the Fourth Amendment, we've met that. And I think
24 this sentence that you point out goes into the analysis
25 as to why people do not have that reasonable expectation

1 of privacy under Katz such that the warrant requirement
2 applies, because they know that this information could
3 be released in all sorts of different ways aside from it
4 being released to the PDMP.

5 THE COURT: Okay. Attorney Galdieri.

6 MR. GALDIERI: I'll just add people don't
7 voluntarily give their information over to the PDMP.
8 People seek medical treatment, medical treatment that
9 they need. They need prescriptions, sometimes to stay
10 alive and prolong their life, and that information is
11 required by law to be put into the PDMP. To say that a
12 patient doesn't have a reasonable expectation of privacy
13 when they walk into the doctor's office to get that
14 treatment of their condition will be available, there's
15 no reasonable expectation of privacy over them, I don't
16 think that position sounds well against the reality of
17 what occurs. And nearly every federal court who has
18 addressed the issue has found these records are highly
19 private and highly intimate, and many have found that
20 they invoke the protection of the Fourth Amendment.

21 THE COURT: But we have cases that have been
22 provided to the Court that have looked at PDMP records
23 in other parts of the country and have enforced
24 administrative subpoenas in the face of not exactly the
25 same arguments you're making, but awfully similar.

1 MR. GALDIERI: So we have a Ninth Circuit
2 opinion that has reversed on standing grounds of
3 intervenors who tried to intervene in a court action for
4 declaratory judgment. It was found that they didn't
5 have standing. The Ninth Circuit recognized expressly
6 at the end of its opinion that the state, through an
7 action to enforce the subpoena, could raise these
8 important privacy interests at a hearing such as the one
9 we're here at today. And we believe that the Utah
10 district court cases incorrectly decided, that the
11 Douglas case in the Tenth Circuit controls, and the
12 Tenth Circuit case in Douglas preceded the Utah case and
13 establishes that individuals have a reasonable Fourth
14 Amendment- based expectation of privacy in their
15 prescription drug records.

16 THE COURT: Okay.

17 MR. AFRAME: That would mean, I mean, and I'm
18 not aware of a case, maybe this case says it, but to get
19 medical records from a hospital you couldn't use a trial
20 subpoena, you couldn't use a grand jury subpoena, you
21 would have to use a search warrant to get medical
22 records from any of the many, many medical providers
23 that are out there. You would not need HIPAA if you had
24 such a scheme because you would have had the probable
25 cause requirement as we all know is a difficult

1 requirement, probably one of the most difficult to get
2 information that there is in the law.

3 So, I'm not aware of a case that says and my
4 own practice tells me you don't need a case to get
5 medical records. So the argument's made that somehow
6 because the state aggregates the same information, so
7 instead I have to go to Dartmouth-Hitchcock and here and
8 there to get it, I can just go to one place, changes the
9 analysis. I'm not aware of any law that says that
10 because this information, while private, of course it's
11 private, but private does not equal warrant, and that's
12 the argument I think that's being made, and so -- I
13 think that's the bottom line. A warrant requirement
14 doesn't apply. I think I've explained why. That takes
15 us back to the Fourth Amendment. Sturm Ruger applies,
16 Sturm Ruger steps are satisfied, the Fourth Amendment's
17 been satisfied, therefore there's no federal impediment
18 to enforcing our federal law that preempts whatever in
19 the state law is inconsistent.

20 THE COURT: Okay. Anything further, Attorney
21 Galdieri?

22 MR. GALDIERI: No, I don't think so, your
23 Honor.

24 THE COURT: Okay. So, this was very helpful
25 to me. Thank you. You've answered my questions very

1 well. I'm going to take this under advisement. I'll
2 try to issue a ruling as quickly as I can, there'll be a
3 written order, okay, a report and recommendation. So
4 thank you.

5 MR. AFRAME: Thank you.

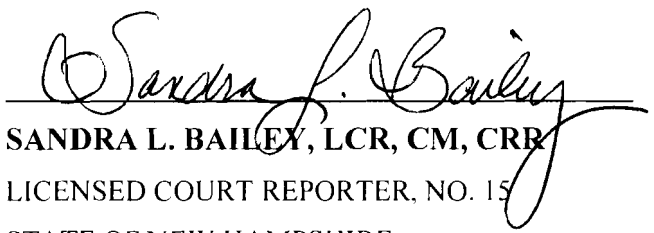
6 MR. EDELMAN: Thank you, your Honor.

7 (Hearing concluded.)
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10
11

12 C E R T I F I C A T E
13

14 I, Sandra L. Bailey, do hereby certify that
15 the foregoing transcript is a true and accurate
16 transcription of the within proceedings, to the best of
17 my knowledge, skill, ability and belief.
18

19
20 Submitted: 10/5/2018

21 
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